26. The next instance of PRB action cited by the ID is the meeting with representatives of RAM, Capitol, and Congressman Perkins' office on April 2, 1991, in response to charges of interference by both parties. (ID at para. 26; HDO at para. 4 & n. 8.) Again, the actual events of this meeting flatly contradict the ID's depiction of PRB as biased in RAM's favor. To the contrary, the ID acknowledges that "[a]t that meeting the staff bluntly told RAM and Capitol to cut out their fighting and obey the rules, or all of their licenses would be revoked by the FCC" (ID at para. 26; CAP-01 at p. 14.) This warning clearly placed both RAM and Capitol on notice that violations by either entity could result in sanctions, including license revocation. There is no suggestion or indication in this meeting that PRB had pre-judged one party as being in the right and the other as being in the wrong.

27. While implicitly acknowledging that the April 2 meeting was even-handed, the ID attempts to portray the May 14, 1991, letter from the Chief of the Land Mobile and Microwave Division (LMMD) to Capitol as improperly tilted in RAM's favor. That letter responded to Capitol's April 3, 1991, written inquiry by advising Capitol that neither RAM nor Capitol were bound by the provisions of 47 C.F.R. § 90.483(d) requiring certain licensees of "interconnected" stations to limit transmissions to three minutes. LMMD held that neither RAM's nor Capitol's systems were bound by this "three-minute" rule because they were not interconnected. (ID at para. 27; CAP-14 at pp. 1, 2.) The ID implies that this was improper with respect to RAM because the Commission's data base indicated that RAM was authorized for interconnected operations. (ID at para. 27; CAP-20 at pp. 2, 13-15.) The facts do not support this inference. In actuality, it is not at all uncommon for a private radio system to be authorized for interconnected operations without actually being interconnected; many

applicants request such authorization so that they will have the flexiblity to become interconnected at a later time without having to seek a new authorization. The authorization does not require the Commission to treat a non-interconnected system as interconnected, however. In this instance, neither RAM's nor Capitol's systems were in fact interconnected. Rather than having an incoming phone call from the public switched telephone network controlling the transmitter and being transmitted directly, their systems instead use "store and forward" paging terminals that process incoming pages and control when and how they are transmitted. (Tr. 520, 529-30.) Thus, LMMD's letter was consistent with Commission policy.

28. Although the ID concludes that Capitol's complaints received a "deaf ear" from PRB, it also notes that Capitol "eventually stopped registering its complaints" shortly after the April 2, 1991 meeting because it felt PRB had not been responsive (ID at para. 31.) As discussed above, however, PRB granted Capitol's application over RAM's objections and was even-handed in admonishing both RAM and Capitol in the April 2, 1991 meeting to cooperate in sharing the channel or face consequences. Thus, the record reflects that PRB even-handedly addressed the concerns of Capitol and RAM up to the very point that Capitol chose, for whatever reason, to stop apprising PRB of its concerns about RAM. It is error for the ID to attribute culpability to PRB for a "deaf ear" to Capitol thereafter when the ID itself acknowledges that Capitol unilaterally chose not to inform PRB of its concerns.

B. The August 1991 Inspection and Subsequent Action Against Capitol Were Proper

29. Despite the clear indications in the record that PRB did not take sides in the initial RAM/Capitol dispute, the ID attacks PRB's subsequent investigation of Capitol and the initiation of this action as evidencing bias against Capitol. The ID is particularly critical of

(1) PRB's request for a field inspection against Capitol while allegedly ignoring Capitol's charges against RAM (ID at paras. 35 & 62); (2) the fact that Capitol did not receive an immediate on-scene report from FOB of the results of the inspection (ID at paras. 44 & 45); and (3) the lack of formal notice to Capitol of RAM's interference complaints. (ID at paras. 22, 23, 26, 34 & note 13.) As discussed below, however, all of these actions by Commission personnel were consistent with existing policy and did not reflect bias against Capitol.

30. Request for field inspection. The ID criticizes PRB's decision to request a field inspection of Capitol based on RAM's July 1991 oral complaint that Capitol was using a device to send imitation tone page transmissions. (ID at para. 35.) Contrary to the view expressed by the Presiding Judge, however, the fact that PRB considered this complaint to warrant monitoring and inspection is hardly evidence of bias against Capitol. Commission operating bureaus have broad discretion to request FOB to conduct such investigations, and requests such as this are common in instances where, as in this case, a large number of complaints are received and it appears unlikely that they can be resolved by other means. There is also no requirement that the Commission provide prior notice to the subject of prospective monitoring, as the ID suggests. The purpose of the inspection in this instance was to investigate RAM's allegations, not to prosecute Capitol based on those allegations.

31. No on-site inspection report required. The ID also erred in ascribing any significance to the fact that Commission engineers did not give Capitol an on-site "report" of the findings of their inspection or communicate to Capitol that they had observed Capitol interfering with RAM. (ID at paras. 44, 45.) Under standard Commission procedure, Capitol had no right to such a report. Indeed, it would be highly unusual (if not improper) for FCC

field engineers investigating complaints to provide the entity being investigated with an on-site report of their findings. The primary job of an FCC engineer at an inspection is to collect data and make a report to FOB or the operating Bureau, which then decides whether the data warrants taking action against the licensee. The engineer's role quite properly does not include making legal assessments of whether violations have occurred. Thus, while the ID makes much of the fact that Capitol's principals "believed" it had "passed" the inspection because the engineers did not communicate any negative findings (see, e.g., ID at para. 44 ("Raymond believed that the inspectors had been satisfied...."), id. at para. 45 ("Capitol assumed that it had passed the inspection")), the engineers in fact had no duty to communicate such information. Moreover, what Capitol "believed" or "assumed" about the results of the inspection is legally irrelevant.

32. Formal notice of complaints not required. The ID criticizes PRB at several points for pursuing complaints by RAM against Capitol even though RAM had not provided Capitol with notice of the complaints. [See, e.g., ID at note 13 (no notice of complaint); id. at para. 23 (RAM call not a bona fide complaint of interference against Capitol); id. at para. 22 (RAM trying to set Capitol up); id. at para. 34 (Capitol not served with a copy of RAM's complaint.)] This criticism ignores the fact that neither complainants nor the Commission are required to provide notice of a complaint unless and until the complaint becomes associated with a restricted proceeding.[17] Indeed, if such a requirement existed, it could easily impede the efforts of Commission personnel to investigate complaints by prematurely warning the

[17] 47 C.F.R. § 0.473 provides: "Reports of violations of the Communications Act or of the Commission's rules and regulations may be submitted to the Commission in Washington or to any field office." It does not provide for any service or notice requirements.

subject of the complaint that it was subject to possible monitoring. In this case, PRB and its staff followed standard procedure in their receipt, investigation, and action upon RAM's complaints. PRB was not required to provide formal notice to Capitol of RAM complaints until the Hearing Designation Order was issued, at which point the proceeding became restricted. It is worth noting, however, that even before this point, Capitol was hardly unaware of RAM's allegations, and had been given repeated opportunities by PRB to respond to them. (See, e.g., HDO at note 7 (citing Capitol's November 28, 1990 and March 5, 1991 responses); ID at para. 18 (citing CAP-11 at pp. 2-3).) Indeed, in most of the circumstances discussed above, Capitol knew of RAM's complaints but chose to believe they had no merit, notwithstanding that in PRB's meeting with RAM and Capitol both parties were expressly informed by PRB that continued interference could result in revocation. (ID at para. 26.)

C. The ID Erred in Concluding that RAM Engaged in Anti-Competitive Conduct that PRB Ignored

33. As noted above, the ID excoriates PRB for pursuing RAM's allegations of interference against Capitol while ignoring evidence that RAM engaged in similar behavior. In reaching this conclusion, the ID relies upon the declaration of Calvin Basham, president of Communications Service, Inc. (CSI), another PCP licensee, who stated that RAM had repeatedly caused harmful interference to CSI's system, resulting in the loss of all of CSI's customers. (ID at para. 13 n. 7). The ID states that PRB "[I]nexplicably" failed to investigate Basham's charges (id.), despite the fact that they "corroborated" Capitol's complaints about RAM (Id. at para. 62.)

34. The ID's reliance on the Basham Declaration is completely improper. Because PRB was not afforded the opportunity to cross-examine Basham, his declaration was

expressly not admitted for the truth of any matter asserted therein.[18] Yet the ID's accusations of misconduct by RAM -- and of PRB turning a blind eye to this alleged misconduct -- are premised on the assumption that Basham's allegations were true. Thus, PRB is accused of bias based on a declaration that it was explicitly precluded from challenging at the hearing. Had it been allowed to do so, PRB was prepared to prove that Basham had retracted the allegations cited by the ID. Because the Basham Declaration was not admitted for the truth of any matter, however, PRB could not and did not offer this evidence. Therefore, the finding that RAM engaged in anti-competitive behavior is erroneous. All reference to CSI should be stricken.

IV. The Presiding Judge Erred In Denying The Joint Motion For Approval Of Consent Agreement Filed By All Parties

35. The Joint Motion for Approval of Consent Agreement filed by all parties on October 28, 1993 was denied by Memorandum Opinion and Order, FCC 93M-722 (November 22, 1993). Talton Broadcasting Company, 66 FCC 2d 674 (1977) (Talton) and 47 C.F.R. § 1.93(b) were cited as barring a settlement because of the character issues in the HDO. The reliance on these authorities as an absolute bar to settlement is misplaced. The Presiding Judge has the authority to exercise discretion to approve settlement, notwithstanding the existence of character issues, within the boundaries of certain limited exceptions to Talton and

---

[18] The Basham Declaration, dated March 14, 1991, was one of two declarations attached to CAP-12, a March 15, 1991 letter from Kenneth E. Hardman, Capitol's counsel, to Donna R. Searcy, the Commission Secretary. When PRB requested that Capitol produce Basham as a witness, Capitol filed a motion objecting to PRB's request. At the hearing, the Presiding Judge granted Capitol's motion provided that Capitol did not attempt to use Basham's Declaration to establish the truth of any matter stated in the declaration, and Capitol elected to abide by this restriction. (Tr. 46-48).

its progeny. First, such discretion may be exercised if the respondent incurs a substantial monetary penalty.[19] In this instance Capitol was prepared to pay a substantial sum under the proposed Consent Agreement in the form of a forfeiture and a voluntary contribution to the United States Treasury. Second, such discretion may be exercised if the public interest benefit of the provision of a valuable non-broadcast service outweighs character considerations.[20] The continued provision of common carrier paging service by Capitol merited consideration under this standard. Third, such discretion may be exercised if, consistent with the Consent Agreement, the Presiding Judge retains authority to later address the facts and circumstances that gave rise to the character issues should similar conduct reoccur.[21] The proposed Consent Agreement, by including Capitol's promise to comply with the Commission's Rules and the Communications Act, would have provided the Presiding Judge with such authority. Finally, even if Talton is applicable to this case, the Bureau believes that Talton is no longer good law in light of the Administrative Dispute Resolution Act[22] and therefore urges that Talton no longer be applied in instances such as this.

---

[19] Coalition for the Preservation of Hispanic B/Casting v. FCC, 893 F.2d 1349, 1358-1360 (D.C. Cir. 1990).

[20] Christina Communications, FCC 87M-2048 (Sept. 1, 1987); see also Allegan County Broadcasters, Inc., 83 FCC 2d 371 (1980).

[21] See, e.g., Consent Order, Sandra V. Crane and Charles P. Paschal, PR Docket No. 92-119, FCC 92M-987 (October 5, 1992); Consent Order, Jerry E. Gastil, PR Docket No. 89-304, FCC 89M-2391 (October 2, 1989); Consent Order, Robert J. King, PR Docket No. 86-8, FCC 86M-2214 (July 9, 1986); and Consent Order, Aaron Ambulette Service, Inc., PR Docket No. 81-903, FCC 82D-17 (March 11, 1982).

[22] The Act, 5 U.S.C. §§ 571, et seq., establishes a statutory framework for federal agency use of alternative dispute resolution (ADR), enabling parties to find acceptable, creative, solutions and to produce expeditious decisions requiring fewer resources than formal litigation. In implementing this legislation, the Commission adopted 47 C.F.R. § 1.18(a).

Conclusion

36. PRB and its staff acted in an above-board and even-handed manner in handling disputes involving RAM and Capitol. Capitol willfully and repeatedly caused harmful interference to RAM on their shared PCP channel. Capitol also violated Commission rules by engaging in improper testing. Capitol made willful and repeated misrepresentations to the Commission. On each of these matters, the ID erred in concluding otherwise, and should be reversed. For these violations of the Act and the Rules, a forfeiture should be assessed against Capitol, and its licenses should be revoked.

Respectfully submitted,
Ralph A. Haller
Chief, Private Radio Bureau

David L. Furth
Acting Chief, Rules Branch

John J. Borkowski
Attorney
Private Radio Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 5202
Washington, D.C. 20554
(202) 632-7125

November 30, 1994

CERTIFICATE OF SERVICE

Rosalind M. Bailey, a secretary in the Land Mobile and Microwave Division, Private Radio Bureau, certifies that she has, on this 30th day of November, 1994, sent by regular first-class United States mail, copies of the foregoing "Private Radio Bureau's Exceptions" to:

Kenneth E. Hardman, Esq.
Moir & Hardman
2000 L Street, N.W., Suite 512
Washington, D.C. 20036

and

Frederick M. Joyce, Esq.
Joyce & Jacobs
1019 19th St., N.W., PH-2
Washington, D.C. 20036

Rosalind M. Bailey